UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

J.D. CONSULTING, LLC, D/B/A/ DONALDSON TRADITIONAL INTERIORS[1]	)	
Employer	)	
and	)	Case Nos. 29-RC-10336
LOCAL 1, NEW YORK, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO	)	
Petitioner	)	
and	)	
OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 530, AFL-CIO	)	
Intervenor	)	
J. ROSEN PLASTERING, INC.	)	
Employer	)	
and	)	Case No. 29-RC-10345
LOCAL 1, NEW YORK, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO	)	
Petitioner	)	
and	)	
OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 530, AFL-CIO	)	
Intervenor	)	

[1] The names of all parties appear as amended at the hearing.

COOPER PLASTERING CORP. Employers	)	
and	)	
LOCAL 1, NEW YORK, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO Petitioner	)	29-RC-10379 (formerly 22-RC-12590)
and	)	
OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 530, AFL-CIO Intervenor	)	

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

J.D. Consulting, LLC, d/b/a/ Donaldson Traditional Interiors ("Donaldson Interiors"), J. Rosen Plastering, Inc. ("Rosen Plastering") and Cooper Plastering Corp. ("Cooper Plastering"), herein collectively called the Employers, perform plastering work for general contractors and other firms engaged in the construction industry. In these consolidated cases, Local 1, New York, International Union of Bricklayers and Allied Craftworkers, AFL-CIO ("Petitioner") filed petitions with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent three separate bargaining units, consisting of all full-time and regular part-time plasterers employed by Donaldson Interiors, Rosen

Plastering and Cooper Plastering, respectively, but excluding all other employees, office clerical employees and supervisors as defined in the Act.

The Employers are members of the Plastering and Spray Fireproofing Contractors of Greater New York, Inc. ("Association"), which is party to a collective bargaining agreement, effective July 1, 2002, through January 31, 2006, with Operative Plasterers and Cement Masons International Association, Local 530, AFL-CIO ("Intervenor"). The Intervenor intervened on the basis of this collective bargaining agreement, which encompasses the petitioned-for unit.

A hearing was held before Tara O'Rourke, Hearing Officer of the Board. The parties[2] appeared at the hearing and submitted briefs.[3] Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

The Employers, the Association and the Intervenor contend that the petitions herein are barred by the collective bargaining agreement between the Intervenor and the Association, arguing that it is a 9(a) agreement, and that the petitions herein were prematurely filed. Further, the Employers, the Association and the Intervenor argue that even if the petition had been timely filed, the only appropriate bargaining unit would be an Association-wide unit, consisting of the plasterers employed by all 13 current members of the Association. The Petitioner takes the position that the collective

[2] The Association, which was represented by the same attorney as the Employers, entered an appearance in this proceeding without formally intervening.

[3] The transcript incorrectly indicates that Intervenor's Exhibit 3 was received, when in fact, the exhibit was withdrawn. As a result, both the Intervenor and the Petitioner inadvertently relied on the document in their briefs, in both the above-captioned case and a related case, C&O Finishes, Inc., et al., Case No. 29-RC-10338 et al. The Intervenor subsequently filed corrected briefs in the two cases, and the Petitioner and Intervenor moved for the rejection of one another's briefs (contending that the Intervenor's corrected briefs were late, and that the Petitioner's briefs incorrectly relied on the withdrawn document). Because I have not relied on the exhibit at issue, these motions are moot.

bargaining agreement is an 8(f) agreement, which does not serve as a contract bar, and that the petitioned-for single-employer bargaining units are appropriate. Further, the Petitioner maintains that the Intervenor is defunct, and is not a labor organization as defined in Section 2(5) of the Act.

The witnesses on behalf of the three employers and the Association were (in the order that they testified) James Donaldson, owner of Donaldson Plastering, Jonathan Wohl, vice president of the Association and a principal of Lawrence P. Wohl, Inc., James Cooper, owner and president of Cooper Plastering, Jerome Rosen, principal of Rosen Plastering, and Michael Patti, president of the Association. Testifying on behalf of the Intervenor was Carmen Barrasso, vice president of the Operative Plasterers and Cement Masons International Association ("OPCMIA") and International trustee of the Intervenor. The Petitioner did not call witnesses.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the collective bargaining agreement between the Intervenor and the Association is an 8(f) agreement. Therefore, as discussed below, it does not serve as a bar to the processing of the instant petition. Moreover, I have concluded that the petitions are timely, even if the collective bargaining agreement is a 9(a) agreement. I have also concluded that the single employer units sought by the Petitioner are appropriate. Further, I have concluded that the Intervenor is a labor organization as defined in Section 2(5) of the Act.

Accordingly, I have directed three separate elections in the units sought by the Petitioner. The facts and reasoning that support my conclusions are set forth below.

FACTS

The Association

The record reflects that the Association was incorporated in October 1989. Its primary function is to represent employers in collective bargaining with the Intervenor and other labor organizations. As stated above, the Association is a party to a collective bargaining agreement with the Intervenor, effective July 1, 2002, to January 31, 2006. Although the employer members did not vote on whether to ratify the collective bargaining agreement, they expressed their views on the negotiations at membership meetings, where the Association's negotiators provided them with status reports. The negotiators on behalf of the Association are Michael Patti and Vincent Colletti, the Association's current and former presidents, respectively.

Several witnesses testified that individual employer members, who pay a membership fee and annual dues, are automatically bound by any collective bargaining agreement negotiated by the Association. However, the employer members do not sign written documents binding them to multi-employer negotiations. Although Patti testified that each individual employer member signed a copy of the current collective bargaining agreement, this testimony was not corroborated. The only Association contract in evidence was signed by one of the Association's negotiators, Vincent Colletti, and by Carmine Mingoia, president, on behalf of the Intervenor.

The record is not precisely clear as to who the members of the Association were on July 1, 2002, the effective date of the current collective bargaining agreement. The agreement itself does not identify the individual employer members, and it does not refer to an Appendix or other document setting forth this information. An unsigned letter

dated March 28, 2005, from the Association to the Intervenor, merely sets forth the names and addresses of the members as of March 28, 2005. This letter lists twelve employer members located at nine addresses in the counties of Nassau, Suffolk, Westchester, Bronx and Kings (Brooklyn), New York, and in Edison, New Jersey. They are as follows:

Name of Member	**Address**	**Name of Principal**
C & D Fireproofing and Plastering Corp.	48 Walnut Street New Rochelle, NY	Dominic Colavito
Vincent Colletti & Co., Inc.	629 Old White Plains Rd. Tarrytown, NY	Vincent Colletti
Donaldson Traditional Interiors	91 Green Street Huntington, NY	Jim Donaldson
Morell-Brown Fireproofing Corp.	722 East 140th Street Bronx, NY	Ivan Kovacevic
Lawrence B. Wohl, Inc.	49 Beech Street Port Chester, NY	Jon Wohl
J. Rosen Plastering, Inc.	1462 Schenectady Avenue Brooklyn, NY	Jerry Rosen
Cooper Plastering, Inc.	98 Pierson Avenue Edison, NJ	James Cooper
Island Diversified, Inc. Island Lathing & Plastering, Inc. Island International Industries	4062 Grumman Blvd. Calverton, New York	Tim Stevens
Patti Fireproofing Corp. Patti & Sons	8 Berry Street Brooklyn, New York.	Michael Patti

In addition, Patti maintained that a thirteenth member, JDC Coverco[4] in Staten Island, joined the Association in the spring of 2005. Although Patti claimed that Dennis Corolla, Jr., principal of JDC Coverco, signed the current collective bargaining agreement, Corolla did not testify at the hearing, and no contract or other document signed by Corolla is in evidence.

Of the twelve employer members on the March 28, 2005, list, there are five members for which there is no record evidence as to when they joined the Association: C & D Fireproofing & Plastering Corp., Morell-Brown Fireproofing Corp., Island Diversified, Inc., Island Lathing & Plastering, Inc., and Island International Industries. As for the other seven listed members, the testimony of Donaldson, Rosen, Wohl and Patti reflects that their five companies (including Patti's two companies) have been members of the Association since well before July 1, 2002, the effective date of the current collective bargaining agreement. In addition, the record indicates that as of July 1, 2002, Vincent Colletti, principal of Vincent Colletti & Co., Inc., was the Association's president and chief negotiator.

Finally, Cooper testified that his company joined the Association in 2002, after the current collective bargaining agreement was finalized. Although Patti testified that Cooper signed the contract, Cooper stated that he did *not* sign the contract, but rather, that his company became bound by the contract after paying the initiation fee and annual dues. Previously, Cooper Plastering was signatory to an independent agreement with the Intervenor.

[4] Patti testified that he is "not 100% sure" whether this is the correct name of this new Association member. The record does not disclose this new member's address in Staten Island.

Alleged 9(a) Recognition of Intervenor

Contractual Recognition Clause – Two Versions

The current collective bargaining agreement between the Intervenor and the Association, effective July 1, 2002, to January 31, 2006, contains the following language (herein called "Version 2") in Article II, Section 2 ("Recognition"):

> The Employer recognizes the Union as the exclusive majority representative of all of it [sic] employees covered by this collective bargaining agreement, pursuant to Section 9(A) of the National Labor Relations Act.
>
> This majority status has been established by the fact that the Union has made an unequivocal request for recognition as the majority representative, the Employer has unequivocally recognized the Union as the majority representative, and the Employer's unequivocal recognition is based on the fact that the Union has shown or offered to show the Employer evidence of its majority support.

Article I, Section 1 ("Parties") includes a definition of Employer:

> ...hereinafter "Employer" means a member of the Association and a party to and bound by this Agreement...

The record also contains a copy of the current collective bargaining agreement between the Intervenor and various independent contractors, which is also effective July 1, 2002, to January 31, 2006. The independent contractors' agreement contains the same recognition language as the Association agreement. However, the record in a related case, C & O Finishes, Inc., et al., Case Nos. 29-RC-10338 et al., of which I take administrative notice, contains two different versions of the independent contractors' agreement. Both are effective July 1, 2002, to January 31, 2006. One of these versions is identical to the version in evidence in the instant case, with identical recognition language. The other version contains the following recognition language in Article II, Section 2 (herein called "Version 1"):

The Employers bound by this Agreement may have granted recognition to the Union, in any one of the following scenarios:

(a) Voluntary Recognition

The Employer(s) bound to this Agreement may have recognized the Union as the exclusive majority representative of all employees covered by this Agreement pursuant to Section 9(a) of the Labor-Management Relations Act. This recognition of majority support is based on an unequivocal request for recognition by the Union as majority representative along with the Union having shown or offered to show evidence of its majority support.

(b) Recognition Following an NLRB Certification

The Employer(s) bound to this Agreement may have recognized the Union as the exclusive majority representative of all employees covered by this Agreement pursuant to Section 9(a) of the Labor-Management Relations Act.

(c) Recognition Follows Some Elections and Some Voluntary Recognition

The Employer(s) bound to this Agreement may have recognized the Union as the exclusive majority representative of all employees covered by this Agreement pursuant to Section 9(a) of the Labor-Management Relations Act. In some cases, this recognition of majority support was based on an unequivocal request for recognition by the Union as majority representative along with the Union having shown or offered to show evidence of its majority support. In other cases, majority support was established by the Union's certification as majority representative by the National Labor Relations Board ("NLRB") following NLRB elections.

The record in C & O Finishes, Inc., et al., Case Nos. 29-RC-10338 et al. reveals that sometime in 2004, the Intervenor revised this recognition language, deleting Version 1 and substituting Version 2. This substitution was triggered by a finding in a proceeding arising in Region 2 of the NLRB, Case No. 2-RC-22768, Acanthus, Inc., that the original recognition language ("Version 1") was inadequate to convey 9(a) status. However, the revised independent contractors' agreement does not indicate on the face of the agreement that it was revised in 2004, and the independent contractors who signed the agreement in 2002 were not required to re-execute the agreement in 2004.

The record does not disclose whether the Association collective bargaining agreement was similarly altered in 2004, or alternatively, whether the Association agreement included the revised recognition language (Version 2) in July, 2002, at the same time that the independent contractors' agreement contained the recognition language subsequently found inadequate in Case No. 2-RC-22768, Acanthus, Inc. (Version 1).

As described in detail below, the Intervenor and the Association provided contradictory testimony regarding the circumstances surrounding the alleged 9(a) recognition of the Intervenor.

Circumstances Surrounding the Recognition – Intervenor Version

Carmen Barrasso, trustee of the Intervenor,[5] testified that there were "two occasions that we met to discuss 9(a) relationships." The first was sometime in 2000, at the Villa Barona Restaurant in the Bronx. According to Barrasso, the 2000 meeting was attended by Patti, Colletti, Rosen, and several other association members. However, Patti and Rosen did not corroborate Barrasso's testimony, and Colletti did not testify in the instant hearing.

At the 2000 meeting, according to Barrasso, he told the employers that he

> ...was seeking 9(a) recognition and I had the authorization cards with me...the individuals in the room, according to Mr. Patti and Mr. Colletti, said, you know, they realize[d] that we were the exclusive bargaining representative for plasterers and it wasn't necessary to show the cards. And I said, "Well, I have them here and I'll be glad to show them to you." And they said, no they wouldn't, they said, "No, we recognize you as the exclusive bargaining representative from the Plasterers."

[5] Barrasso was appointed as the Intervenor's emergency International Trustee on March 24, 2005. Prior to that date, he was assigned to the Intervenor by the OPCMIA International.

At that point, according to Barrasso, "We left from there. Mr. Colletti came along with me, along with Mr. Patti, went up to the offices. And based on that conversation, they then signed the agreement substantiating that we were the exclusive, they recognized us as the exclusive bargaining representative." The agreement allegedly signed in 2000 is not in evidence. Under cross-examination, Barrasso revealed that the request for recognition in 2000 was made on behalf of a sister local, Local 260 of the OPCMIA, which merged with the Intervenor on July 1, 2000.

Barrasso further testified that after a subsequent meeting in 2002, which he did not attend, Patti told Barrasso, "We're signing a 9(a) agreement based on the same circumstances as the last time, which we know that you are the exclusive bargaining representative for plasterers...Carmen, we agree, you know, I wanted to inform you that we recognize you as the exclusive representative for plasterers in the New York area." Patti did not corroborate this testimony.

Circumstances Surrounding the Recognition – Association Version

The Association's president, Patti, was the only Association or employer witness to testify regarding the events leading up to the alleged 9(a) recognition of the Intervenor. Vincent Colletti, who signed the agreement on behalf of the Association, did not testify at the hearing. Although Donaldson, Cooper, Rosen and Wohl (the vice president of the Association) testified that they are bound by the current Association agreement, they did not testify regarding the circumstances surrounding the recognition.

Patti's testimony focused on a meeting in 2002 at the Villa Barona restaurant, attended by Carmine Mingoia and George Nickoletos, the Intervenor's president and vice president at that time, and by Patti, representing the Association. The exact date of the

meeting was not specified. Patti contradicted himself a number of times on the issue of whether the Intervenor offered to demonstrate its majority status on an employer-by-employer basis. For example, in response to a series of leading questions by the Intervenor's attorney, Patti testified as follows:

> Q: [Quoting from the contractual recognition clause]: "And the employer's unequivocal recognition is based on the fact that the union has shown or offered to show the employer evidence of its majority support." And that happened as well, right?
>
> A: That's correct.
>
> Q: And he said, "I have cards to show evidence of majority support," correct?
>
> A: That's correct. But I still didn't see them.
>
> Q: And that happened in the case of the request for each single employer of the Association prior to the 2002 negotiations?
>
> A: Right.
>
> [Objection overruled]
>
> Q: When that...majority status was established and the request for recognition was made, and that you recognized the majority representative, now I'm talking about 2002 for the Association, that was done separately for each employer member of the association?
>
> A: Absolutely.
>
> The Hearing Officer then asked:
>
> Q: Describe for us how, you said you mentioned each member. How did this happen?
>
> A: Well, he didn't mention each member. He said that basically, if you want to see the cards of all the members that we, that are part of the association, I have them. And I says it's not necessary for me to look at them.
>
> The Intervenor's attorney then interposed yet another leading question:
>
> Q: And just to follow up on that, did he—for each single employer?

A: Right.

Under further questioning by the Hearing Officer, Patti elaborated:

A: Well, you've got, you've got, I gave him eight or nine, whatever it was at that time, employees [sic]. And he had cards for each employee [sic], he said.

At a later point in his testimony, Patti contended, for the first time, that Mingoia took out the authorization cards and put them on the table at the Villa Barona restaurant, in segregated piles according to employer. Patti claimed that he "saw" the cards but "didn't look at them." Patti conceded that at that time, he did not know how many people each company employed, and Mingoia did not provide a number as to how many cards he had for each company.

Mingoia did not testify in this proceeding.

Recognition Extended on Behalf of Cooper Plastering Corp. and JDC Coverco

Patti testified that Cooper Plastering Corp. joined the Association about a month or two after the 2002 agreement was finalized. At about that time, Patti told Cooper that "I had spoke to Carmine Mingoia, told him that we were entertaining bringing Mr. Cooper into our Association. And if his, then Mr. Mingoia told me that his employees, I have the cards, if you'd like to see them. I said, 'No, it's not necessary, far as I'm concerned.'" This testimony was not corroborated by Cooper or Mingoia.

With regard to JDC Coverco, which joined the Association in April or May, 2005, Patti testified that he told Dennis Corolla, the principal of the company, that the current Association agreements with the Intervenor and another labor organization "are the agreements we work under, if you want to join the Association, read them carefully, sign them and send them back." Further, Patti "did tell [Corolla] that we're under the 9(a) agreement." According to Patti, Corolla signed the agreement and joined the

Association, and Patti subsequently notified the Intervenor of this by mail, and by placing a telephone call to Barrasso. During this telephone call, according to Patti, he recognized the Intervenor as the 9(a) representative of the employees of JDC Coverco, after Barrasso asked him whether he "wanted to see the cards, he had the cards for the workers that were employed by JDC and I says not necessary." Barrasso did not corroborate this testimony. The collective bargaining agreement allegedly signed by Corolla, and the letter informing the Intervenor that Corolla was now a member, are not in evidence. Corolla did not testify in the instant hearing.

Labor Organization Status of the Intervenor

Carmen Barrasso, International trustee of the Intervenor, testified that he is responsible for monitoring the Intervenor, including its financial and record-keeping functions and compliance with the International's constitution and by-laws. In addition, his duties as trustee include representing the Intervenor's members, processing grievances on their behalf, meeting with employers, administering and enforcing the Intervenor's collective bargaining agreements, holding membership meetings, and policing the Intervenor's territory. As trustee, he performs these functions on behalf of the Intervenor.

The record reflects that when Barrasso was appointed as trustee, the former officers of the Intervenor were removed from their positions. However, elections for new officers are planned "as quickly as possible." Barrasso has reappointed a former field representative, and the Intervenor employs clerical employees and leases buildings and automobiles. In addition to the collective bargaining agreement with the Association, the Intervenor has contracts with about 70 independent contractors, as well as other multi-

employer associations. The Intervenor continues to refer plasterers to signatory employers.

DISCUSSION

Section 8(f) Status of Intervenor and Appropriateness of Single Employer Bargaining Units

Section 8(f) of the Act provides:

> ***It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement***, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act; ***Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*** (emphasis supplied)

The Board's approach to effectuating the public policy considerations underlying Section 8(f) is best articulated in *John Deklewa & Sons*, 282 NLRB 1375 (1987), in which the Board sought to achieve "an appropriate balance between the dual congressional objectives of promoting and maintaining employee free choice principles and labor relations stability in the construction industry." *Deklewa*, 282 NLRB at 1382. In the interest of labor relations stability, *Deklewa* held that neither an employer nor a union may repudiate an 8(f) agreement prior to its expiration date, in the absence of a

decertification election. *Deklewa,* 282 NLRB at 1385. In this regard, the Board noted that Congress added Section 8(f) to the Act as part of the 1959 amendments for the purpose of "specifically sanction[ing] the established industry practices that the Board had previously found unlawful," such as the "negotiation, adoption, and implementation of collective bargaining agreements in the construction industry without initial reference to the union's actual majority status." *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987).

However, Congress also "sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires." *Deklewa,* 282 NLRB at 1380-81. The second proviso, specifying that "an 8(f) agreement may not act as a bar to, *inter alia*, decertification or rival union petitions," was intended to be "an 'escape hatch' for employees subject to unwanted representation imposed before they were hired." *Deklewa*, 282 NLRB at 1381, 1382.

The "conversion doctrine" applied by the Board prior to *Deklewa* "contravene[d] Congress's intent to provide employees with a meaningful and readily available escape hatch," inasmuch as it permitted "the extraordinary 'conversion' of such nonbinding [8(f)] relationships into full-fledged, wholly enforceable 9(a) relationships constituting an absolute bar to employees' efforts to reject or to change their collective bargaining representative." *Deklewa*, 282 NLRB at 1382. After an 8(f) agreement was signed, a labor organization's "conversion" from 8(f) to 9(a) status could be "almost instantaneous" under pre-*Deklewa* rules. *Deklewa*, 282 NLRB at 1383. This was because the finding that a union enjoyed majority support, permitting the conversion to

9(a) status, was often based on a "highly questionable factual foundation," such as the presence of an enforced union-security clause, or the actual union membership of a majority of unit employees. *Deklewa*, 282 NLRB at 1383-84. Realistically, the Board observed, "union membership is not always an accurate barometer of union support," nor is "a union security clause [that] operates to compel new employees to join the union because union membership is the price for obtaining a job." *Deklewa,* 282 NLRB at 1383-84 (citations omitted). In sum, *Deklewa* abandoned the conversion doctrine because it "render[ed] the second proviso nugatory," and it "hardly advance[d] the objective of employee free choice." *Deklewa,* 282 NLRB at 1383.

Accordingly, after *Deklewa*, the Board "will require the party asserting the existence of a 9(a) relationship to prove it." *Deklewa*, 282 NLRB at 1385 n. 41; *see also Central Illinois Construction,* 335 NLRB 717, 718 (2001)(Board continues to hold that there is "a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f), with the burden of proving that the relationship instead falls under Section 9(a) placed on the party so asserting."). Section 9(a) status can only be established through a Board election, *Deklewa*, 282 NLRB at 1385, or through "voluntary recognition accorded to a union by the employer of a stable work force where that recognition is based on a clear showing of majority support among the union employees, e.g., a valid card majority." *Deklewa*, 282 NLRB at 1387 n. 53; *see also Central Illinois Construction*, 335 NLRB at 718. Such majority support must exist on the day that recognition is extended. *Comtel*, 305 NLRB at 291; *see also Central Illinois Construction,* 335 NLRB at 720.

In the multiemployer context, *Deklewa* jettisoned the "merger doctrine," which provided that "when a single employer joins a multiemployer association and adopts that association's collective-bargaining agreement, the single employer's unit 'merges' into the multiemployer unit and the requisite inquiry into majority support occurs in that multiemployer unit." *Deklewa*, 282 NLRB at 1379. In other words, pursuant to the merger doctrine, a labor organization could become the 9(a) representative of all employees employed by members of a multi-employer association, without ever establishing that it enjoyed majority support among the employees of each individual employer member. Declaring that "employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association," *Deklewa,* 282 NLRB at 1385 n. 42, the *Deklewa* Board held that single employer units remain the appropriate unit under the scenario described above. *Deklewa,* 282 NLRB at 1377, 1385; *Comtel Systems Technology, Inc*., 305 NLRB 287, 289 (1991). Thus, in the multiemployer bargaining context, majority support must be established on a single-employer basis, and a showing of majority support on an association-wide basis is insufficient to convey 9(a) status. *Comtel*, 305 NLRB at 287-90; *Kephart Plumbing, Inc.*, 285 NLRB 612, 612 (1987). The act of joining a multiemployer association and assenting to a multiemployer agreement does "not make [an employer] subject to a 9(a) relationship with [a union or] merge its employees into the larger unit unless majority support among the [single employer's] employees was manifested prior to that assent." *Comtel,* 305 NLRB at 290.

The Employers and Intervenor herein rely on *Central Illinois Construction,* 335 NLRB 717 (2001), which involved an allegation that the respondent employer had

unlawfully withdrawn recognition from the charging party union. The respondent employer attacked the union's 9(a) status, which was based on a contractual recognition clause adopted three years prior to the filing of the unfair labor practice charge. *Central Illinois Construction*, 335 NLRB at 717. The Board found that this contractual recognition language did not establish 9(a) status because it did "not state that the Respondent's recognition was based on a contemporaneous showing, or offer to show, that the Union had majority support." *Central Illinois Construction*, 335 NLRB at 720. However, the Board held that "[a] recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support." *Central Illinois Construction*, 335 NLRB at 719-720; *but see Nova Plumbing, Inc.*, 330 F.3d 531, 533 (D.C. Cir. 2003)(denying enforcement on the grounds that the Board, in applying *Central Illinois Construction* "despite strong record evidence that the union may not have enjoyed majority support as required by section 9(a)…failed to protect the employees section 7 rights.").

Since *Central Illinois Construction* involved a single employer, rather than members of a multiemployer association, it did not specifically address the requirements that must be met for a multiemployer agreement to be independently sufficient to establish a union's 9(a) representation status. However, in light of the principles set forth in *Deklewa* and *Comtel*, a multiemployer contract could only meet this test if its language

unequivocally indicates that each individual employer member extended 9(a) recognition prior to assenting to the multiemployer agreement that is alleged to confer 9(a) status.

Under *Central Illinois Construction*, the Board "will continue to consider relevant extrinsic evidence bearing on the parties' intent in any case where we find that the contract's language is not independently dispositive." *Central Illinois Construction*, 335 NLRB at 720 n. 15. In the instant case, the language in the recognition clause in the Association contract is not sufficiently clear to confidently conclude that each individual employer member extended 9(a) recognition, based on a clear showing of, or offer to show, majority support among the employees of each individual employer member of the Association, prior to assenting to the multi-employer agreement purporting to confer 9(a) status on the Intervenor. Nor does the contract indicate when each of the individual employer members extended recognition to the Intervenor. In fact, the contract fails to disclose the identities of these individual employer members.

In sum, the language of the contract is not "unequivocal" or independently dispositive, and extrinsic evidence must be considered. *Central Illinois Construction*, 335 NLRB at 720 n. 15. In the instant case, however, the record evidence raises more questions than it answers. The evidence is unclear as to which of the individual employer members recognized the Intervenor, and whether the recognition extended by these entities was based on an Association-wide majority or an employer-by-employer majority. In addition, it is not clear *when* recognition was extended by the members. There are five employer members for which there is no record evidence as to when they joined the Association, or recognized the Intervenor. The witnesses representing a number of other individual employer members (Donaldson, Rosen, Cooper and Wohl)

did not specifically state that they had recognized the Intervenor as the majority representative of their employees, or that they believed the Intervenor had the support of a majority of their employees as of the time recognition was extended. They did not testify that they signed the Association agreement containing Version 2 of the recognition language, or that they had seen or read the recognition clause. Rather, they merely indicated that they believed themselves to be bound by the current Association agreement.

Moreover, the Intervenor did not reveal whether it inserted the revised recognition language ("Version 2") into the Association agreement in 2004, as it did with respect to the independent contractors' agreement. If so, there is no evidence that there was a new showing of majority support, or offer to show evidence of majority support, to either the Association or its members, in 2004.

With respect to the most recent member of the Association, Patti admitted that the Intervenor offered to demonstrate its majority support among JDC Coverco employees only *after* JDC Coverco signed the collective bargaining agreement containing Version 2 of the recognition language, in the spring of 2005. Thus, the recognition allegedly extended by JDC Coverco did not convey 9(a) status, since there is no evidence that the Intervenor enjoyed majority support on the day that recognition was extended. *See Comtel*, 305 NLRB at 291; *Central Illinois Construction*, 335 NLRB at 720.

The Intervenor and the Association provided two different versions of the events surrounding the Association's recognition of the Intervenor. Both of these versions were uncorroborated. According to the Intervenor's witness, Barrasso, Patti told him that the recognition extended by the Association in 2002 was "based on the same circumstances

as the last time, which we know that you are the exclusive bargaining representative for plasterers." "The last time" appears to refer to a meeting sometime in 2000, at which members of the Association recognized Local 260 (not the Intervenor) as the "exclusive bargaining representative" of the plasterers. Although Barrasso testified that he "had the authorization cards with [him]" at the 2000 meeting, he did not claim that the cards were current, or that they were signed by a majority of the employees employed by each employer member of the Association. Barrasso did not indicate whether the Intervenor demonstrated its majority support, or offered to show evidence of majority support, on July 1, 2002, when the current collective bargaining agreement became effective.

Patti's testimony regarding the circumstances surrounding the recognition was confusing and self-contradictory. Although he conceded, at one point, that Mingoia "didn't mention each member" when he offered to demonstrate the Intervenor's majority support, he contended, at other points in his testimony, that Mingoia *did* mention each member when offering to demonstrate the Intervenor's majority support on an employer-by-employer basis. Although Patti repeatedly asserted that he "didn't see" the cards, he later maintained that he *did* see the cards, in segregated piles according to employer, but that he "didn't look at them."

In addition, Patti conceded that in 2002, Mingoia did not know how many employees were employed by each employer member, and that Mingoia did not indicate how many current authorization cards were signed by each employer member's employees. Based on this admission, it is not clear how Patti "knew" that the Intervenor had the support of a majority of each employer member's employees.

Because the evidence in support of the Intervenor's alleged 9(a) status is inconclusive, the presumption that a bargaining relationship in the construction industry was established under Section 8(f) has not been rebutted. *See Central Illinois Construction,* 335 NLRB at 717; *Deklewa*, 282 NLRB at 1385 n. 41. Therefore, I have concluded that the Association agreement does not serve as a contract bar, *Deklewa*, 282 NLRB at 1375, 1377, and that the single employer bargaining units sought by the Petitioner are appropriate. *Deklewa*, 282 NLRB at1377, 1385,1385 n. 42; *Comtel*, 305 NLRB at 289. Accordingly, I will direct three separate elections in the bargaining units sought by the Petitioner.

Timeliness Of The Petitions

Even if the record established that the Intervenor had achieved 9(a) status, I would nonetheless find that the continued processing of these petitions is warranted.

Contracts with fixed terms of more than three years will bar election petitions only during the first three years of the contract. *Vanity Fair Mills, Inc*., 256 NLRB 1104, 1005 (1981). A contract whose duration is longer than three years is treated, for contract bar purposes, as though it were a contract of 3 years' duration, and a petition may be filed during the 90- to 60-day open period prior to the third anniversary date of the contract. *Dobbs International Services, Inc*., 323 NLRB 1159, 1160 (1997). Accordingly, the open period for filing a petition in the instant case was from April 2 to May 1, 2005 (60 to 90 days prior to June 30, 2005). The petition in C&O was filed on March 9, 2005, and the petitions in Art in Construction, Perna and Crescent were filed on March 22, 2005.

However, the Board has repeatedly held that "a petition will not be dismissed, even though prematurely filed, if a hearing is directed despite the prematurity of the petition and the

Board's decision issues on or after the 90th day preceding the expiration date of the contract." *The Mosler Safe Company*, 216 NLRB 9 (1974); *Westclox Division of General Time Corporation*, 195 NLRB 1107 (1972); *Royal Crown Cola Bottling Co. of Sacramento*, 150 NLRB 1624, 1625 (1965); *see also Maramount Corp*., 310 NLRB 508, 512 (1993). Thus, even if the Intervenor is the 9(a) representative of the Employers' employees, the independent contractors' agreement does not bar the instant petitions.

Labor Organization Status of Intervenor

> Section 2(5) of the Act provides the following definition of "labor organization":
>
> > Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Under this definition, structural formalities are not prerequisites to labor organization status. *Yale New Haven Hospital*, 309 NLRB 363 (1992)(no constitution, by-laws, meetings or filings with the Department of Labor); *see East Dayton*, 194 NLRB at 266 (no constitution or officers). Even if a union is not yet actually representing employees, it is a statutory labor organization if it admits employees to membership and was formed for the purpose of representing them. *See Butler Manufacturing Company*, 167 NLRB 308 (1967); *see also The East Dayton Tool & Die Company*, 194 NLRB 266 (1971). If a labor organization meets the statutory definition, "the fact that it is an ineffectual representative, that its contracts do not secure the same gains that other employees in the area enjoy, that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the [Board's] conclusion…that the organization is a labor organization within the meaning of the Act." *Alto Plastics*, 136 NLRB 850, 851-52

(1962). A labor organization found to be the beneficiary of unlawful employer domination, interference or assistance under Section 8(a)(2) of the Act does not thereby lose its Section 2(5) status. *Electromation, Inc.*, 309 NLRB 990, 994 (1992).

Further, a labor organization is "defunct" only if it is "unable or unwilling" to represent employees." *Hershey Chocolate Corporation*, 121 NLRB 901, 911 (1958). A local union is not rendered "defunct" by the mere fact that it has been placed under trusteeship by the international union with which it is affiliated. *Earthgrains Co.*, 334 NLRB 1131 (2001).

In the instant case, the record amply demonstrates that the Intervenor meets these standards. In testimony that was uncontested, Barrasso affirmed that the Intervenor holds membership meetings, processes grievances, meets with employers, and administers and enforces more than 70 collective bargaining agreements. There is no evidence that the Intervenor is unable or unwilling to represent its members.

This uncontested testimony is sufficient to establish that the Intervenor satisfies the statutory definition of "labor organization" set forth above. Accordingly, I conclude that the Intervenor is a labor organization as defined in Section 2(5) of the Act.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. (a) The parties stipulated that J.D. Consulting, LLC, d/b/a/ Donaldson Traditional Interiors, a limited liability corporation with its principal place of business located at 48 Nassau Road, Huntington, New York, has been engaged in the performance of plastering work for various general contractors, at various locations. During the past

year, which period is representative of its annual operations generally, Donaldson Interiors, in the course and conduct of its business operations, purchased and received at its Huntington, New York, facility, building materials and supplies valued in excess of $50,000, from various suppliers located outside the State of New York.

(b) The parties stipulated that J. Rosen Plastering, Inc., a corporation with its principal place of business located at 3153 Monterrey Drive, Merrick, New York, has been engaged in the performance of plastering installation for various firms engaged in the construction industry. During the past year, which period is representative of its annual operations generally, Rosen Plastering, in the course and conduct of its business operations, purchased and received at its Merrick, New York, facility, building materials and supplies valued in excess of $50,000 directly from various suppliers located outside the State of New York.

(c) The parties stipulated that Cooper Plastering Corp., a corporation with its principal place of business located at 98 Pearson Avenue, Edison, New Jersey, has been engaged in the performance of plastering work for various general contractors, at various locations in New Jersey and New York. During the past year, which period is representative of its annual operations generally, Cooper Plastering, in the course and conduct of its business operations, purchased and received at its job sites in New York, building materials and supplies valued in excess of $50,000 from various suppliers located outside the State of New York.

Based upon the stipulations of the parties, and the record as a whole, I find that J.D. Consulting, LLC, d/b/a/ Donaldson Traditional Interiors, J. Rosen Plastering,

Inc. and Cooper Plastering Corp. are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner and Intervenor are labor organizations within the meaning of Section 2(5) of the Act. The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of Donaldson Interiors, Rosen Plastering and Cooper Plastering constitute three separate units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> (A) All full-time and regular part-time plasterers employed by J.D. Consulting, LLC, d/b/a/ Donaldson Traditional Interiors, EXCLUDING all other employees, office clerical employees and supervisors as defined in the Act. (Case No. 29-RC-10336)
>
> (B) All full-time and regular part-time plasterers employed by J. Rosen Plastering, Inc., EXCLUDING all other employees, office clerical employees and supervisors as defined in the Act. (Case No. 29-RC-10345)
>
> (C) All full-time and regular part-time plasterers employed by Cooper Plastering Corp., EXCLUDING all other employees, office clerical employees and supervisors as defined in the Act. (Case No. 29-RC-10379)

DIRECTION OF ELECTIONS

Three separate elections by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the times and places set forth in the notices of election to be issued subsequently subject to the Board's Rules and

Regulations. Eligible to vote are employees in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are (a) employees in the unit who were employed for at least 30 days in the 12-month period preceding the eligibility date for the election, and (b) employees in the unit who had some employment during that 12-month period and were employed for at least 45 days within the 24 months immediately preceding the eligibility date for the election.[6] Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible to vote in each unit shall vote whether or not they desire to be represented for collective bargaining purposes by Local 1, New York, International Union of Bricklayers and Allied Craftworkers, AFL-CIO, by Operative Plasterers and

[6] *Steiny and Company, Inc*., 308 NLRB 1323 (1992); *Daniel Construction Company, Inc*., 133 NLRB 264 (1961), *as modified*, 167 NLRB 1078 (1967).

Cement Masons International Association, Local 530, AFL-CIO or by neither labor organization.

LISTS OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to lists of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by each Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such lists must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **July 13, 2005**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employers at least three working days prior to an election. If the Employers have not received the notices of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies

of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employers to comply with these posting rules shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **July 20, 2005.** The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: July 6, 2005, Brooklyn, New York.

/S/ ALVIN BLYER

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Alvin P. Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201